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November 25, 2002

Via E-Mail (regcomments@fincen.treas.gov)

FinCEN
PO Box 39
Vienna, Virginia 22183-1618
Attention: Mr. James F. Sloan, Director,
FinCEN,
NPRM-Section 352
Unregistered Investment Company Regulations

Re: Notice of Proposed Rulemaking- Anti-Money Laundering <u>Programs for Unregistered Investment Companies</u>

Dear Mr. Sloan:

This letter is submitted in response to the request of the Financial Crimes Enforcement Network ("FinCEN") for comment[1] on the proposed amendment to the Bank Secrecy Act ("BSA") regulations to prescribe minimum standards applicable to certain unregistered investment companies, such as hedge funds, commodity pools, and similar investment vehicles, pursuant to the provision in the BSA that requires financial institutions to establish anti-money laundering programs.

Seward & Kissel has a substantial number of clients that are unregistered pooled investment vehicles such as hedge funds, commodity pools and private equity funds ("private funds") that would fall within the proposed definition of "unregistered investment company", as well as a substantial number of clients that are registered investment advisers and/or commodity pool operators managing such private funds. Many of our clients are considering the implications of the proposed rulemaking. The views we express in this letter, however, are our own and do not necessarily reflect those of our clients.

We commend FinCEN and the Department of the Treasury's diligence in crafting this proposed rulemaking and in working together with the Securities Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") to do so. We commend in particular FinCEN and the Department of the Treasury's efforts in proposing amendments which limit the definition of "unregistered investment company" so as not to overburden entities that are most likely not to be used for money laundering purposes. We believe that some further

[1] Department of the Treasury, 31 CFR Part 103, Notice of Proposed Rulemaking, published in Federal Register, Vol. 67, No. 187 (September 26, 2002).

clarifications would be useful. Accordingly, we submit the following comments and urge FinCEN to consider them before adopting the proposed rule amendments:

1. Redemption Rights. Under proposed Rule 103.132(a)(6)(i)(B), an "unregistered investment company" would include only those companies that otherwise meet the definition set out in the Rule that give an investor a right to redeem any portion of his interest within two years after that interest was purchased. We do not believe that the exception to the definition for funds with lock-ups that are two years or greater will cause private funds to adopt longer lock-ups to avoid the requirements of the Patriot Act.

We request a clarification of the application of the "two year lock-up" exception. The release suggests that the two year lock-up period is applicable not only to the initial capital investment, but is a rolling lock-up on each new capital investment by an investor. We believe that it is typical for a private fund with a lock-up to restrict withdrawals on initial capital only. There are a number of other variations on the "lock-up" concept that we note here. Some of our clients have lock-up provisions that would permit an investor to redeem prior to the end of the lock-up period, provided that investor pays a redemption fee of a certain percentage of the redemption proceeds. Because a redemption fee is an economic disincentive to using a private fund for money laundering purposes, we request that FinCEN consider excluding such a fund from the definition of "unregistered investment company." In addition, many private funds permit the general partner to waive the lock-up period as to certain investors, e.g., employees, friends and family of the general partner, or certain large or strategic investors. We suggest that the ability to waive the lock-up as to some investors should not prevent the fund from coming within the exception. Finally, we would request a clarification of the redemption rights provision to address funds which have multiple classes of interests, with one class, for example, having a three-year lock-up, but the other classes having shorter lock-up periods.

2. Notice Filing. Many of our clients are registered as investment advisers with the SEC or as commodity pool operators ("CPOs") or commodity trading advisors ("CTAs") with the CFTC and National Futures Association. In addition, as noted in the release, commodity pools operated or advised by registered CPOs or CTAs are identified in the National Futures Association's database. We urge FinCEN to consider exempting private funds advised or sponsored by such entities from a separate notice filing with the Department of the Treasury on the basis of their being identifiable by other Federal functional regulators. We also request clarification as to whether notice filings under the proposed rule will be publicly available or will remain confidential.

We appreciate the opportunity to comment on the proposed rulemaking. If you have any questions regarding this letter, please contact the undersigned at the telephone numbers indicated below.

Very truly yours,

/s/ Steven B. Nadel

Steven B. Nadel
(212) 574-1231